

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>KINANECO, INC.</b>	:	DETERMINATION
	:	DTA NO. 819547
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1999 through August 31, 2002.	:	

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Petitioner, Kinaneco, Inc., c/o Gregory J. Kinane, 2925 Milton Avenue, Syracuse, New York 13209, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1999 through August 31, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on September 16, 2004 at 2:00 P.M. Petitioner appeared by Terzolo & Co., Inc. (Edward Terzolo, Accountant). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Joseph Ayoub and Robert Dean).

Since neither party elected to reserve time to file a post-hearing brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

***ISSUE***

Whether the Division of Taxation's test period audit should be modified on the basis that petitioner did not make sales to Trans World Entertainment on a regular and consistent basis

throughout the audit period, and therefore the one sale made to Trans World Entertainment during the test period should be excluded from the test period.

***FINDINGS OF FACT***

1. Petitioner herein, Kinaneco, Inc., is a printing company located in Syracuse, New York which designs and prints such items as letterheads, business cards, company envelopes, brochures, reports and catalogs. Petitioner's primary customer base is located in Onondaga County.

2. For the period at issue in this proceeding, September 1, 1999 through August 31, 2002, petitioner filed timely sales and use tax returns reporting thereon taxable sales of \$1,707,007.00. Petitioner also remitted timely payment of the tax shown as due on its returns.

3. In mid 2002, the Division of Taxation ("Division") commenced a field audit of petitioner's books and records to determine if it had collected and remitted the proper sales and use taxes due for the period September 1, 1999 through August 31, 2002. Although petitioner's books and records were adequate and complete, thus requiring the Division to perform a detailed audit, petitioner and the Division consented to the use of a test period audit by executing Form AU-377.12, Test Period Audit Method Election. Form AU-377.12 specifically provides that petitioner may protest the audit results "on grounds such as the particular test period selected, the inclusion of certain transactions within the test period, the taxability of certain transactions, or the method of projecting the results of the test period findings."

4. The quarter ending May 31, 2001, wherein petitioner reported gross sales of \$202,819.00 and taxable sales of \$177,564.00, was selected as the test period. Reported nontaxable sales for the test period of \$25,255.00 were substantiated as claimed. Also, no tax was found due during the test period on expense purchases or asset acquisitions. A review of all

taxable sales for the test period revealed two separate errors involving a total of 23 sales invoices. First, tax was not being collected on shipping charges shown on taxable sales. Second, rate errors were discovered on shipments going to locations with a tax rate higher than Onondaga County's 7% rate. The errors noted on these 23 sales invoices resulted in additional tax due of \$382.58. The \$382.58 of additional tax due found for the test period was divided by taxable sales reported for the test period of \$177,564.00, thus producing an error rate of .2155%. The .2155% error rate was next applied to reported taxable sales for the entire audit period of \$1,707,007.00 to compute additional tax due of \$3,678.59.

5. On April 14, 2003, the Division issued a Notice of Determination to petitioner asserting that \$3,678.59 of additional sales tax was due for the period September 1, 1999 through August 31, 2002, together with interest of \$521.25. Petitioner filed a timely petition with the Division of Tax Appeals protesting the Notice of Determination on the ground that the one sale it made to Trans World Entertainment during the three-month test period should not be extrapolated over the entire three-year audit since sales to Trans World Entertainment, a customer outside its normal market area, did not occur on a regular basis during the audit period.

6. As previously noted, the \$382.58 of tax found due for the test period is the result of errors made by petitioner on 23 sales invoices. The one sales invoice at issue in this proceeding is an \$18,419.24 sale made by petitioner to Trans World Entertainment on March 30, 2001 where it incorrectly collected sales tax at a rate of 7% instead of 8%. This one error resulted in additional tax due of \$184.19, which amount is more than 48% of the total tax due found for the test period. The errors found on the other 22 sales invoices produced a tax due for the test period of \$198.39, an average of \$9.02 in tax due per invoice.

7. During the entire three-year audit period, petitioner made a total of six sales to Trans World Entertainment, with the first one occurring during the test period and the last one being made on March 12, 2002. Petitioner concedes that it incorrectly charged sales tax at the 7% rate, instead of 8%, on all six sales it made to Trans World Entertainment and that it also neglected to charge any sales tax on the shipping charges shown on the sales invoices issued to Trans World Entertainment. The parties agree that additional tax due on sales petitioner made to Trans World Entertainment for the entire audit period totals \$460.63, consisting of \$410.84 for the rate error ( $\$41,084.18 \times 1\%$ ) and \$49.79 for tax due on freight charges ( $\$622.42 \times 8\%$ ).

#### ***SUMMARY OF THE PARTIES' POSITIONS***

8. Petitioner maintains that sales made to Trans World Entertainment during the audit period did not occur on a regular basis and that the one sale made to this customer should therefore be deleted from the test period. The Division argues that the test period audit is meant to include "irregular customers" since such "irregular customers" could be found in any test period analysis.

#### ***CONCLUSIONS OF LAW***

A. The record herein contains sufficient evidence to show that sales made to Trans World Entertainment, a customer outside petitioner's normal geographic market area, did not occur on a regular and consistent basis during the audit period. Petitioner has established that it made a total of only six sales to Trans World Entertainment during the entire three-year audit period and that inclusion of the one large sale to Trans World Entertainment in the test period, which sale is clearly disproportionate to the other sales noted in the test period, produces an unfair and inequitable result. Accordingly, the Division's test period audit is to be modified by deleting the sale made by petitioner to Trans World Entertainment from both the numerator and denominator

in computing the error rate for the test period. The following table reflects the computation of the revised error rate:

<b>ITEM</b>	<b>AMOUNT</b>
Reported taxable sales for test period	\$177,654.00
Less sales to Trans World Entertainment for test period	-18,419.24
Adjusted taxable sales for test period	\$159,144.76
Tax due per test period	\$382.58
Less tax on Trans World Entertainment sales for test period	-184.19
Adjusted tax due for test period	\$198.39
<b>REVISED ERROR RATE</b>	
\$198.39 / \$159,144.76	.1247%

B. Since the \$460.63 of tax due on sales petitioner made to Trans World Entertainment has been accounted for in detail, it is necessary to reduce reported taxable sales for the entire audit period (\$1,707,007.00) by reported taxable sales made to Trans World Entertainment for the entire audit period (\$41,084.19) to determine adjusted taxable sales for the audit period of \$1,665,992.81. Additional tax due of \$2,077.49 on sales, exclusive of Trans World Entertainment sales, is determined by multiplying the revised error rate of .1247% by adjusted taxable sales of \$1,665,992.81. Total tax due for the entire audit period is determined to be \$2,538.12 (\$460.63 + \$2,077.49).

C. The petition of Kinaneco, Inc. is granted to the extent set forth in Conclusions of Law “A” and “B”; the Division is directed to modify its Notice of Determination dated April 14,

2003 consistent with this determination; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York  
November 24, 2004

/s/ James Hofer  
PRESIDING OFFICER